Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

(3)

No. 01-827

IN THE
SUPREME COURT OF THE UNITED STATES

CRYSTAL STAR PHILLIPS, individually, and As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS By and through her mother, legal guardian and Next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR., parent of Martin Shane Phillips,

Petitioners,

vs.

HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

GREGORY VON COPELAND
Counsel of Record
403 S. Cheyenne, Suite 1200
Tulsa, Oklahoma 74103
Telephone 918.582.1116

Attorney for Petitioners

83pp

ORIGINAL QUESTIONS PRESENTED

I. Whether separation of powers was violated by the Tenth Circuit when it re-legislated Congress' intent clearly expressed in 42 U.S.C. § 1395dd(a) of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), by preempting that expressed intent with its newly articulated holding that hospital violations of § 1395dd(a) are measured by a "perceived" standard, which in fulfilling a hospital's EMTALA obligation, only requires hospital personnel to "perceive" an illness or not "perceive" an illness, and eliminates the medical screening examination requirement of subsection (a), as defined by Congress in subsection (e)(1)?

II. Whether separation of powers was violated by the Tenth Circuit when it contravened the Legislature's intent, by creating a safe harbor for "patient dumping", an intentional act, conceded by the Tenth Circuit to be the very "evil" Congress intended to cure, but nonetheless, even in the presence of serious and voluminous evidence that hospital personnel did in fact perceive the patient's true condition and further chose to circumvent EMTALA's requirements by misrepresenting the patient's true condition in the medical chart, and by testifying they "did not perceive" the condition at issue, held notwithstanding this evidence, that a hospital will not be liable for an EMTALA violation under § 1395dd(a), as long the hospital personnel testify that they "did not perceive" symptoms in a particular patient?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY BRIEF TO OPPOSITION 1

FACTUAL RECONCILATIONS 1

REASONS FOR GRANTING THE WRIT 6

I. THE COURTS OF APPEAL ARE SPLIT ON THEIR INTERPRETATION AND APPLICATION OF 42 U.S.C. 1395dd(a)

..... 6

II. THE TENTH CIRCUIT'S DECISION WILL CAUSE IRREPARABLE HARM TO, AND

PUT AT RISK, LARGE POPULATIONS OF THIS COUNTRY'S CITIZENS WHO PRESENT TO EMERGENCY ROOMS SEEKING HELP FOR EMERGENCY MEDICAL CONDITIONS

.... 7

III. THE TENTH CIRCUIT'S HOLDING DRASTICALLY DEPARTS FROM CONGRESS' ORIGINAL INTENT FOR 42 U.S.C. § 1395dd

..... 9

IV. THE "PRECEIVED" STANDARD VIOLATES SEPARATION OF POWERS

.... 9

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Baber v. Hospital Corporation of America,

977 F.2d 872 (C.A.4 1992) 9, 10

Phillips v. Hillcrest,

244 F.3d 790 (C.A.2001). 2

Jackson v. East Bay Hospital

246 F.3d 1248 (C.A.9 2001) 7

Power v. Arlington Hosp. Ass'n,

42 F.3d 851 (C.A.4 1994) 7

Roberts v. Galen,

525 U.S. 249, 119 S.Ct. 685 (1999) 6

United States v. Havens,

446 U.S. 620, 100 S.Ct. 1912 (1980). 5

Vickers v. Nash Gen. Hosp. Inc.,

78 F.3d 139, 144 (4th Cir. 1996) 7

Statutes

42 U.S.C. § 1395dd 2, 9

§ 1395dd(a) 2, 7, 10

§ 1395dd(b) 2, 3

§ 1395dd(d) 6

§ 1395dd(e) 10

Other Authorities

131 Cong. Record s13892-01. 9

135 Cong. Rec. E 3691-01, 1989

Clare Asberry, "Dumping the Poor: Despite Federal Law, Hospitals Still Reject Sick Who Can't Pay: The Imperiled Underinsured". 8

HR. Rep. 99-241 III, 1985 8

U.S. Code Cong. Admin. News, Vol.3, p. 728, 1982 8

Laurie Winslow, "Hillcrest to Buy Three Hospitals", Tulsa World Sept. 11, 1998 at A1 . . .Supp. App. To Reply Br., p. 1

FACTUAL RECONCILIATIONS

All of Tulsa Oklahoma knew about the sale of Tulsa Regional Medical Center ("TRMC") to Hillcrest Healthcare System, parent of TRMC and Hillcrest Medical Center ("Hillcrest"), and the relationship the two sister hospitals had prior to the date of Martin Shane Phillips' death on September 28, 1998. *See Tulsa World Article, dated September 11, 1998, Supp. App to Reply Br. p.* 1. For Respondent, Hillcrest, to inform the Supreme Court of these United States that there was "**no**" relationship between TRMC and Hillcrest "at that time", all while emphasizing the word **no** in bold letters at footnote two (2) on p. 9 of its Brief, in and of itself, boldly highlights the willingness of a hospital to misrepresent and change records to avoid liability as Plaintiffs/Petitioners have alleged occurred from the inception of this case and have continued this allegation through and to the Supreme Court of the United States of America. *Opp. Br. p. 9, fn 2.*

The article of September 11, 1998, which is seventeen (17) days prior to the death of Martin Shane Phillips while at TRMC, states the following:

> Negotiations have been going on for several months, said Brent Nielsen, senior vice president of Hillcrest Healthcare System. We have reached terms for the sale, and we've entered into a letter of intent with Columbia/HCA and now we're in a process of due diligence that will last for approximately 60 days. *See Supp. App. to Reply Br., p. 1.*

This supports the Petitioners' claims at trial that Martin Shane Phillips was denied medical treatment at Hillcrest on September 23, 1998, because of Hillcrest's belief that Mr. Phillips was uninsured, and thusly, Hillcrest violated EMTALA, and that upon his death on September 28, 1998, at its sister hospital, TRMC, the two hospitals made joint efforts with key personnel, to reconcile and cover up the EMTALA violations,

as well as create Hillcrest's only affirmative defense against Petitioners' negligence causes at trial. *See Pet., p. 11* ("Evidence shows Hillcrest had a plan..."). This explains why the death certificate of Martin Shane Phillips shows up in the medical chart of Hillcrest after his death. *See Supp. App. to Pet.*, p. 20.

Hillcrest states at page 3 of its Brief, that it is presenting a more accurate statement of the facts for the benefit of this Court, and complains that the Petitioners' presented Statement of the Case, "at times, misstates the evidence presented" and it is "incomplete". *See Opp. Br., p. 3.* Yet, in the event this Court strikes down the "perceived" standard, articulated by the Tenth Circuit on March 26, 2001; *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 797 (C.A.10 2001), Hillcrest, attempts to whittle down its liability, beginning at the bottom of p. 10 of its Brief by stating:

> In the 'Statement of the Case' portion of their Petition, Petitioners allege that their lawsuit against HMC involved allegations of 'failure to screen' (42 U.S.C.A. § 1395dd(a)) and 'failure to stabilize prior to transfer' (42 U.S.C.A. § 1395dd(b)). This reference to 'failure to stabilize', found in subsection (b) of the EMTALA statute, is the **first time** Petitioners have **ever** made any allegation that HMC failed to 'stabilize' Mr. Phillips. *Opp. Br.* p. 10-11.

To substantiate its wholly inaccurate attempt at whittling, Hillcrest requests this Court to, "*See Pretrial Order, App.*, p. 3". *Id* at p. 11. But if this Court will look carefully at this document in Hillcrest's Appendix, it is in fact titled "Agreed Pre-trial Order", a document which has <u>never</u> been entered or filed into this case, which is why there is no "Filed" stamp, or date on the document such that Hillcrest could create it in its Appendix. *See* certified copy of *Civil Docket Case #*: 98-CV-829 (Docket as of June 26, 2000 11:06 AM), in *Supp. App. to Reply Br.*, p. 4.

What is key for this Court to understand, is the way this document is intended to be utilized by Hillcrest and its attorneys-- that is to attempt to show there is nothing in Petitioners' trial court history alleging the "failure to stabilize" contention which would come under 42 U.S.C. § 1395dd(b), and that therefore it is the "**first time** Petitioners have **ever** made" this allegation. *See Opp. Br.* p. 11. Hillcrest does not hesitate to utilize bolding to emphasize its point, and it can thereby be inferred that it is representing to this Court that it is firm in its assertion in this respect. *Id.* However, the actual document that was filed in this case is the "Agreed Amended Pre-Trial Order" in which Petitioners listed 40 contentions, with contention number thirty-nine (39) having twenty (20) sub-contentions. *See Reply App. p. 1.* The false document in Hillcrest's Appendix, cuts off Petitioners' contentions just after number thirteen (13), omitting the remaining twenty-seven (27) contentions and the twenty (20) sub-contentions, without notifying this Court that there are more to the Petitioners' contentions than those listed. Attached in Hillcrest's Brief, at App. 4, of this false document, Hillcrest leaves out the ellipsis after number thirteen (13), that are a well-known basic rule of writing construction when there is an omission in the text so that the reader may know substance has been intentionally left out. *See Opp. Br. App. 4, compared to Reply App. p. 1.* Yet, on App. 5, Hillcrest demonstrates its knowledge of the rule when it uses the ellipsis to notify this Court of omissions subsequent to Hillcrest's contention number seven (7). *Id* at App. 5.

Petitioners lay to rest this straw man created by Hillcrest and submit contention seventeen (17) of the "Agreed Amended Pre-trial Order" that reads as follows: "Martin Shane Phillips should have been admitted into the hospital", (i.e., not discharged). *Reply App.*, p. 4. This is just a way of saying Hillcrest should not have released Mr. Phillips in an unstable condition or until he was stabilized as is required under 42 U.S.C. § 1395dd(b). Petitioners, again, re-contended this argument in number thirty-nine (39), at bullet count eighteen

(18), Petitioners state: "she failed to admit him into the hospital." [1] *Id at Reply App.*, p. 5. The Petitioners do not have any knowledge of where Hillcrest got the document that it is using in its Appendix, and neither was it a part of the record submitted to the Tenth Circuit. *See Record, Vol. IV, #4, just behind the Addendum to Final Pretrial Order*. It was not ever part of this case and it falsely represents the record in a grave and suspicious way to The Supreme Court of the United States of America.

Hillcrest continues with abhorrent renditions of the record to this Court. Beginning on page 17 of its Brief, Hillcrest states: [2]

> Petitioners argue that a hospital should not be able to submit facts and evidence which show what its personnel "perceived" when providing care and treatment to a

---

[1] Moreover, on p. 11 of its brief, Hillcrest mentions only the argument for § 1395dd(a) made by Petitioners in their Opening Statement, and does not mention the §1395dd(b) argument presented in the same Opening Statement, on the same page of the trial transcript, just sixteen (16) lines apart. *See App. p. 28, ln 2* ("The evidence will be that Martin Phillips should have been admitted into the hospital.").

[2] On p. 17 of its Brief, Hillcrest states, "In fact, Petitioners go so far as to boldly suggest that the HMC triage nurse, the HMC treatment nurse, and Dr. Cobb falsified records and misrepresented Mr. Phillips' condition, even though no evidence whatsoever exists to support this novel theory..." This has been brought up many times throughout the course of this litigation. At the December 2, 1998 pretrial conference the trial court ruled due to the late date, that Petitioners could not bring in the police forensic handwriting expert who verified that initials "BP" supposing to represent Barbara Petty on the emergency department treatment record were inconsistent with her handwriting, when in fact the policy that triggered the investigation by Petitioners was only turned over to them by Hillcrest weeks before. *Reply App.* 18-29,. Hillcrest attempts to deflect the altered erased triage sheet, by explaining that Plaintiffs' exhibit 45 was a specific request for a "blank" triage sheet. Plaintiffs' 45 is not blank, although Hillcrest wishes it were, and it was never specifically requested. See Discovery Request, *Sup. to Reply Br.*, 64.

> patient who presents to the emergency room for treatment. The Petitioners argue that, because HMC's diagnosis was allegedly incorrect, they incorrectly "perceived" Mr. Phillips' medical condition. *See Opp. Br.* p. 17.

These are gross deformities and twistings of what Petitioners argue in their Petition for Writ of Certiorari, and the fact that Hillcrest makes no citation to these useless and nonsensical statements, support Petitioner's belief that these statements are merely thrown in to confuse this Court as to the real issues.

Instead, Petitioners have submitted that causing representations by medical personnel to be taken as true, as does this new "perceived" standard violates the long held tenant that a witness, by taking the stand puts his credibility at issue and is subject to the scrutiny of cross-examination. *See Pet. p. 22, and 23, and See also, United States v. Havens, 446 U.S. 620, 626-27, 100 S.Ct. 1912, (1980)*, ("It is essential, therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the [plaintiff] be permitted proper and effective cross-examination in an attempt to elicit the truth."). Regarding this, Petitioners are saying a medical personnel's version of the events must be allowed to be tested and challenged and an EMTALA claim must not be kicked out under a Rule 50 motion merely because the medical personnel testifies he/she "undertook" to determine whether a symptom existed in a particular patient.[3] Petitioners went on to argue that

---

[3] See *Pet.*, at p. 24, footnote 7, where the trial court reasoned that once an "undertaking" to determine whether Mr. Phillips appeared ill had been testified to, Hillcrest, as a matter of law is entitled to the granting of the Rule 50, regardless of fact questions which existed as to his true condition when he presented to the Hillcrest emergency room, and additionally, the factual controversions of evidence presented in Petitioners' Petition, including that of sinister and intentional conduct were presented to the Tenth Circuit in "Appellants Opening Brief" attached to the Petition as part of the Appendix beginning on *App.* 91; the facts begin on *App.* 98 –

the original intent of Congress goes beyond any "perceived" standard to which the Tenth Circuit is now holding, and violates separation of powers principles. *Pet.* p. 28.

Additionally, Petitioners did not allege as Hillcrest stated, *supra*, that because Hillcrest's diagnosis was incorrect, it incorrectly "perceived" Mr. Phillips' medical condition. Petitioners have argued that Hillcrest cooperatives, in fact, recognized Mr. Phillips' actual symptoms, but misrepresented the medical chart, in an effort to cover Mr. Phillips' true clinical presentation, the idea for Hillcrest is that if no emergency condition could be proven regarding Mr. Phillips' September 23, 1998 presentation, then Hillcrest has helped its defenses if needed later. *See Pet.* p. 13. Congress saw the temptations that a doctor might have to misrepresent and minimize the true symptoms of a patient, and set out a civil cause of action as well as civil penalties for misrepresenting a patient's true condition. *See § 1395dd(d)(1)(B)(ii) and (d)(2)(A).*

Petitioners advise this Honorable Court that they stand firmly on the facts presented in their Petition and certainly disagree that Hillcrest has stated the facts with more accuracy, and would clear up Hillcrest's statement on p. 2 of its Brief that the trial of this case "concluded on December 18, 1999", but it in fact ended on Friday, December 17, 1999.

REASONS FOR GRANTING WRIT

I. THE COURTS OF APPEAL ARE SPLIT ON THEIR INTERPRETATION AND APPLICATION OF 42 U.S.C. § 1395dd(a)

Hillcrest takes issue whether in footnote 5 of this Court's opinion in *Roberts v. Galen*, 525 U.S. 249, 253, 119 S.Ct. 685,687 (1999), this Court recognized a split in the application

---

App. 114, and the Tenth Circuit affirmed the trial court's Rule 50 decision, announcing its newly stated "perceived" standard.

of § 1395dd(a), when it noted that various other circuits conflicted with the Sixth in this regard. This Court is in the best position to answer this. Nonetheless, Hillcrest concedes that the standard set in the Tenth Circuits', "perceived" standard, is one of liability for actual knowledge. *Opp. Br.* p. 12.

This requirement has been rejected in *Powers v. Arlington Hospital*, 42 F.3d 851, 859 (C.A.4 1994)("To assert that a hospital may only be held liable for failing to provide an appropriate medical screening examination if it has actual knowledge of an emergency medical condition, when the medical screening examination is the vehicle for determining the presence of such an emergency medical condition, stretches the bounds of reason."); *But see Vickers v. Nash General Hospital*, 78 F.3d 139, 144 (C.A.4 1996)("EMTALA is implicated only when individuals who are perceived to have the same medical condition receive disparate treatment.").

The Ninth Circuit has more rightly held that the focus is on the procedure and whether or not it is "designed to identify acute and severe symptoms that alert the physician of the need for immediate medial attention to prevent serious bodily injury", and that this procedure be "comparable" to that offered to others presenting with similar symptoms. *Jackson v. East Bay Hosptial*, 246 F.3d 1248, 1256 (C.A.9 2001). A continued survey of the law, outside the scope of this Reply, clearly shows many diverging variances of the "disparate treatment" approach. Yet, a majority of these circuits are not answering the call of § 1395dd(a), and certainly, those following a "perceived" standard are not.

II. THE TENTH CIRCUIT'S DECISION WILL CAUSE IRREPARABLE HARM TO, AND PUT AT RISK, LARGE POPULATIONS OF THIS COUNTRY'S CITIZENS

There are approximately 14.9 million persons in the Tenth Circuit alone. *See Oklahoma Demographic Forum by State, Okla. Dept. of Commerce, Census* (2000). "Thirty- seven

million Americans are without health insurance." *136 Cong. Rec. E254-01, 1990 Hon. Fortney Stark.* In the case at bar, Hillcrest was informed that Martin Shane Phillips had insurance, but did not have his card with him do to a mis-mailing upon a change in his employer's group employee carrier. *Supp. App. to Pet. p. 4.* Therefore, it is **not** unlikely that even those with insurance, are subject to being "dumped" by a hospital which is uncertain about the security of payment, meaning if a hospital has not yet verified the grade of insurance, or if the policy of insurance is not one classified by that hospital to be profitable for the hospital, that hospital might be of the mind to look for the "patient dumping" procedural escape. *See 135 Cong. Rec. E3691-01, 1989, "Dumping The Poor: Despite Federal Law, Hospitals Still Reject Sick Who Can't Pay: The Imperiled Underinsured",* Clare Ansberry, Wall Street Journal, submitted by Rep. Donnelly, ("While dumping is most closely associated with the uninsured, the country's 50 million underinsured are at risk as well").

Hillcrest in its Brief beginning at p. 16, in addressing this issue, addresses absolutely nothing about why it states the Tenth Circuit's decision will not put the "Population ... at risk", other than to say that negligence law will protect the population "when an error is made". *Opp. Br.* p. 16.

> Although at least 22 states have enacted statutes or issued regulations requiring the provision of limited medical services whenever an emergency situation exists, and despite the fact that many state court rulings impose a common law duty on doctors and hospitals to provide necessary emergency care, some are convinced that the problem needs to be addressed by federal sanctions. *H. R. Rep. 99-241, (III), 1985; U.S. Code Cong. Admin. News Vol. 3, p. 728, 1986.*

The legislative history of the promulgation of § 1395dd, in the above excerpt of the House Report of September 11,

1985, reveals that Congress, although negligence existed under common law in many states imposing a duty on "doctors and hospitals to provide necessary emergency care", felt that state negligence claims were not enough. *Id.* Congress intended EMTALA to go beyond negligence protections. *Id.*

III. THE TENTH CIRCUIT'S HOLDING DRASTICALLY DEPARTS FROM CONGRESS' ORIGINAL INTENT FOR 42 U.S.C. § 1395dd

As recognized in *Baber v. Hospital Corporation of America*, 977 F.2d 872, 880 (C.A.4 1992), "The avowed purpose of EMTALA was . . . to provide an '"adequate first response to a medical crisis'" for all patients and "'send a clear signal to the hospital community. . . that all Americans, regardless of wealth or status should know that a hospital will provide what services it can when they are truly in physical distress.'" (Citing 131 Cong. Rec. S13892-01 (Oct. 23, 1985)(quoting statements of Sen. Dole and Durenberger, respectively).

For circuits following the same "perceived" standard as the Tenth Circuit, as long as medical personnel testify he/she did not "perceive" that a policy applied, (i.e., did not perceive the symptom triggering a policy and procedure) then a hospital is not liable, regardless of a deluge of evidence showing the symptoms were perceived. *Phillips* at 797. This means the medical personnel's testimony is taken as a given and no challenge can be made because at the close of a Plaintiff's evidence, as a matter of law, the hospital is granted a directed verdict, (i.e., Rule 50 motion), and intentional conduct is protected.

IV. THE "PERCEIVED" STANDARD VIOLATES SEPARATION OF POWERS

A violation of separation of powers occurred upon the holding of the Tenth Circuit's newly articulated "perceived" standard, replacing the mandatory medical screening required

by Congress. *See* § 1395dd(a). No longer is an "appropriate medical screening examination" as defined in (e)(1) the requirement of EMTALA. *Id.* But instead, a hospital, pursuant to *Phillips*, is now only required to "perceive" or not "perceive" an illness or symptom. *Phillips* at 797.

EMTALA demands that a hospital do more than merely "look" at a person with chest pain and a fast heart beat, and send them home with no testing. EMTALA demands that such symptoms be addressed with testings and findings which investigate the cause of the symptoms, in that it states, "the hospital **MUST** provide an appropriate medical screening examination . . . **to determine whether or not**" **there exists an medical emergency condition** "**such that the absence of immediate medical attention could** reasonably be expected to **result in**"—(i) placing the health of the individual in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part. *See* § 1395dd(a) and § 1395dd(e)(1)(A). (emphasis added). This means at a minimum that EMTALA demands that the method of examination be reasonably calculated to identify the above described emergency conditions. This is the original intent of Congress. *See Baber* at 880. (Citing 131 Cong. Rec. S13892-01 (Oct. 23, 1985)(quoting statement of Sen. Dole) (to provide an ""adequate first response to a medical crisis"" for all patients).

CONCLUSION

Determining liability under §1395dd(a) by whether nurses and doctors "perceive" or don't "perceive" a symptom rather than by whether the hospital engaged in prescribed procedures intended legitimately to identify whether an emergency medical condition exists, rewrites the statute, and further, creates a safe harbor for intentional misconduct and thusly, violates separation of powers and must be struck down. This Supreme Court should grant the Petitioners' writ.

Respectfully Submitted,

Gregory Von Copeland
Counsel of Record
403 S. Cheyenne, Suite 1200
Tulsa, Oklahoma 74103
Telephone 918.582.1116

APPENDIX

1. AGREED AMENDED PRE-TRIAL ORDER... 1

2. PORTIONS OF PRE-TRIAL CONFERENCE OF NOVEMBER 30TH, 1999 13

3. PORTIONS OF PRE-TRIAL CONFERENCE OF DECEMBER 2ND, 1999 28

4. PORTIONS OF PRE-TRIAL CONFERENCE OF DECEMBER 8TH, 1999 38

5. PORTIONS OF PRE-TRIAL CONFERENCE OF DECEMBER 10TH, 1999 45

6. PORTIONS OF THE TRIAL TRANSCRIPT OF JURY TRIAL DECEMBER 13TH, - 17TH, 1999 63

SUPPLEMENTAL APPENDIX OF REPLY BRIEF

7. FRONT PAGE TULSA WORLD ARTICLE DATED SEPTEMBER 11TH, 1998 ..... Sup. App. Reply Br 1

8. CERTIFIED COPY OF CIVIL DOCKET CASE #98-CV-829 (Docket as of June 26th, 2000 11:06 AM) .....Sup. App. Reply Br. 4

9. PLAINTIFFS' MOTION TO ADD ADDITIONAL WITNESS (HANDWRITING EXPERT) AND TO REOPEN DISCOVERY FOR LIMITED PURPOSE AND FOR PRODUCTION AND INSPECTION OF ORIGINAL DOCUMENT ..... Sup. App. Reply Br. 34

10. PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT HILLCREST MEDICAL CENTER ..... Sup. App. Reply Br. 64

11. PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO DEFENDANT HILLCREST MEDICAL CENTER ..... Sup. App. Reply Br. 73

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS, By and through her mother, legal guardian and next) friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR., parent of Martin Shane Phillips	)	**FILED**
	)	**DEC 13 1999**
	)	**Phil Lombardi**
	)	**Clerk, U.S.**
the Plaintiffs,	)	**District Court**
	)	**Case No. 98-CV-829H(E)**
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma	)	
the Defendants.	)	

AGREED AMENDED PRE-TRIAL ORDER

IT IS ORDERED:

1. Statement of the case:

a. Brief factual summary: On September 23,1998 Martin Phillips, 25 years of age, presented to the Emergency Room at Hillcrest Medical Center, was seen by Dr. Carolyn Cobb, Emergency Room Physician, and

released. On September 28, 1998, Martin Phillips presented to a different hospital where he died.

Prior Court Orders: This Court issued an order filed September 14,1999, denying Hillcrest Medical Center's motion for summary judgment. This Court granted summary judgment in favor of Defendants Cobb and TEP as to the EMTALA claim only. This Court accepted supplemental jurisdiction over the state law claims pursuant to 28 U.S.C.A. § 1367 (a).

See Other Orders attached hereto.

b. Jurisdiction and Venue: Federal jurisdiction is based on Title 28 U.S.C.A. § 1331, pursuant to questions involving the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C.A. § 1395dd. Pursuant to 28 U.S.C.A. § 1391 (c), venue is proper in the Northern District. Pursuant to prior Order, this Court is exercising supplemental jurisdiction pursuant to 28 U.S.C.A. § 1367. Defendants deny jurisdiction.

c. Plaintiffs' remaining contentions:

1. Plaintiffs allege this Court has federal question jurisdiction (this Court has accepted supplemental jurisdiction pursuant to 28 U.S.C.A. § 1367).
2. Plaintiffs allege that pursuant to Oklahoma's Wrongful Death Act, 12 O.S. § 1051, *et seq.*, Plaintiffs are entitled to prosecute this matter.
3. Defendant , Hillcrest Medical Center failed to provide an appropriate medical screening examination within the capabilities of their emergency department, which constitutes a violation of the Emergency Medical

Treatment and Active Labor Act, 42 U.S.C.A. § 1395dd. Said failure was the proximate cause of the death of Martin Shane Phillips.

4. Plaintiffs allege Hillcrest Medical Center was negligent and that said negligence was the proximate cause of the death of Martin Shane Phillips.
5. Plaintiffs allege Hillcrest Medical Center is liable under the theory of ostensible agency.
6. Plaintiffs allege Hillcrest Medical Center is liable under the theory of respondeat superior.
7. Plaintiffs allege Carolyn Cobb, M.D., was negligent and that said negligence was the proximate cause of the death of Martin Shane Phillips.
8. At all relevant times herein, Carolyn Cobb, M.D. was employed by Tulsa Emergency Physicians, Inc.
9. Plaintiffs allege Tulsa Emergency Physicians was negligent and that said negligence was the proximate cause of the death of Martin Shane Phillips.
10. Plaintiffs allege Tulsa Emergency Physicians is liable under the theory of respondeat superior.
11. Plaintiffs contend that as a consequence of the death of Martin Shane Phillips, Plaintiffs have suffered damages.
12. Martin Shane Phillips was neither contributory nor comparatively negligent.
13. Plaintiffs allege Plaintiffs are entitled to actual and punitive damages.

14. Hillcrest's policies and procedures were violated.
15. Hillcrest has withheld from Plaintiffs at least one document pertaining to Martin Phillips.
16. Phillips was treated differently than a patient in similarly situated circumstances would have been treated.
17. Martin Phillips should have been admitted into the hospital.
18. Hillcrest had already decided not to admit Phillips even prior to him seeing a physician.
19. Phillips was treated differently based upon his status.
20. Hillcrest is strictly liable.
21. Hillcrest refused to provide records to Crystal Phillips' mother and legal guardian.
22. TRMC contacted Hillcrest regarding the Phillips death.
23. Hillcrest and Tulsa Regional are owned by the same parent company.
24. Phillips presented with symptoms (and bacterial endocarditis) not contained in the chart.
25. Carolyn Cobb did not treat Martin Phillips appropriately and did not cause the appropriate tests to be performed.
26. Phillips waited at least 2 ½ hours before he was seen by a physician.
27. Dr. Cobb improperly diagnosed Martin Phillips.
28. Hillcrest did not triage Martin Phillips appropriately.

29. People were leaving the emergency room because patients were having too wait to long.

30. Hillcrest's ER was overly burdened on September 23,1998.

31. Hillcrest has already admitted the emergency room has still not achieved the level of performance that patients and their families expect.

32. Martin Phillips looked solely to and relied upon Hillcrest for treatment.

33. Carolyn Cobb was authorized by Hillcrest to render medical services in the emergency room on September 23, 1998.

34. Hillcrest is estopped from denying responsibility for the negligence of Carolyn Cobb.

35. Hillcrest advertises in an attempt to cause individuals to attend their ER.

36. There was an agreement between Hillcrest and Tulsa Emergency Physicians on September 23,1998, for TEP to provide services to Hillcrest's ER.

37. Plaintiffs have suffered damages as a direct and proximate cause of the acts and/or omissions of Defendants.

38. Martin Phillips was septic on September 23,1998, at Hillcrest.

39. Dr. Cobb fell below the acceptable standard of medical care:

- she failed to recognize the higher acuity of his illness.
- She failed to observe Phillips had chills/fever or both.

- She failed to observe the Phillips had an ashen/pale/sickly appearance.
- She failed to observe that Phillips had congestion in his chest.
- She failed to observe Phillips' extreme weakness and fatigue.
- She failed to observe Phillips was seriously ill.
- She failed to observe the clinical significance of o blood pressure of 129/55 with a tachycardic patient.
- She failed to observe that she gave Norflex to a patient with tachycardia.
- She failed to order an EKG.
- She failed to order a chest x-ray.
- She failed to do her own blood pressure examination.
- She failed to do a blood pressure examination by taking readings in both arms.
- She failed to perform a pulse examination and determine the presence and nature of pulses in all four extremities.
- She failed to perform a skin and extremity examination.
- She failed to take vitals herself to verify the vitals taken by triage nurse (Defendant Cobb and TEP

object as not previously pled and move to strike).

- She failed to order a blood work/blood culture.
- She failed to admit him into the hospital.
- She failed to make accurate dictation (Defendant Cobb and TEP object as not previously pled and move to strike)
- She failed to contact Phillips regarding giving him Norflex. (Defendant Cobb and TEP object as not previously pled and move to strike).

40. Plaintiffs contend that Defendants have conspired to cover up the actions of Defendants (Defendants object to this contention).

d. Defendants' remaining contentions:

Defendant Carolyn Cobb and Tulsa Emergency Physicians, Inc.'s contentions:

Defendant Cobb, and Tulsa Emergency Physicians, Inc. assert that based upon the patient's complaints, a complete, adequate, and thorough examination was carried out. Specifically, an appropriate medical screening examination was carried out as required under EMTALA. Also, Defendants Cobb and Tulsa Emergency Physicians, are not proper Defendants pursuant to EMTALA and relevant case law. These Defendants deny that Dr. Cobb's treatment fell below the standard of care relative to the patient's presenting complaints. These Defendants deny all allegations of negligence, improper staffing, vicarious liability, or Plaintiffs' entitlement to any alleged compensatory and punitive

damages. Finally, Defendants state the patient was comparatively/contributory negligent in not stating drug use.

Defendant Hillcrest Medical Center's contentions:

1. Denial of all claims of the Plaintiffs.
2. Denial of federal court jurisdiction under EMTALA.
3. Denial of any violation of EMTALA and/or negligence.
4. Denial of agency for the physicians.
5. Denial of causation.
6. Denial of damages.
7. Contributory/comparative negligence of Martin Shane Phillips in not stating drug use.

2. The following facts are admitted by the parties and do not require proof (stipulations and admissions):

   A. Plaintiff Crystal Star Phillips, daughter of Martin Shane Phillips, is a resident of Tulsa County, State of Oklahoma.
   B. Plaintiff, Fred Martin Phillips, Jr., father of Martin Shane Phillips, is a resident of Rodgers County, State of Oklahoma.
   C. Defendant, Carolyn Cobb, is a resident of Tulsa County, State of Oklahoma.
   D. Defendant Hillcrest Medical Center, is an Oklahoma corporation doing business in Tulsa County, State of Oklahoma.
   E. A substantial part of the events giving rise to this claim occurred in Oklahoma and within the Northern District of Oklahoma.
   F. Hillcrest Medical Center was subject to the provisions of EMTALA on September 23, 1998.
   G. At all relevant times herein, specifically on September 23,1998, Carolyn Cobb was an employee of Tulsa Emergency Physicians, Inc., and working as an employee of Tulsa Emergency Emergency Physicians, Inc.

H. Hillcrest Medical Center has written off charges for any medical services it rendered to Martin Shane Phillips' on September 23,1998.

I. No medical bills were ever created by Hillcrest Medical Center pertaining to Martin Shane Phillips' visit to Hillcrest on September 23,1998.

J. The parties stipulate to Tulsa Emergency Physicians, Inc. being named as a co-Defendant in this lawsuit.

K. No peer review documents were created pertaining to Martin Shane Phillips' visit to Hillcrest.

L. The parties stipulate the life expectancy of Martin Shane Phillips was an additional 49 years.

3. The following facts, though not admitted, will not be contested at the time of trial:

None in addition to the above.

4. Remaining issues:

a. The following issues of fact reaming for determination by the trial:

A. Were Defendants negligent?

B. Were policies and procedures at Hillcrest violated?

C. Did Martin Shane Phillips present to Hillcrest with an emergency medical condition?

D. Was Martin Shane Phillips comparatively/contributory negligent?

E. What were Martin Shane Phillips complaints and symptoms upon presentation to Hillcrest Hospital on September 23, 1998?

F. Whether the alleged negligence of any Defendant caused the death of Martin Shane Phillips?

G. What damages, if any, should be assessed against any particular Defendant?

H. Was EMTALA violated?

I. Did Hillcrest Medical Center provide Martin Shane Phillips with an appropriate medical screening examination to determine whether he presented with an emergency medical condition, and, if it did not, did a failure to do so cause the death of Martin Shane Phillips?

b. The following issues of law remain for determination by the court:

A. Hillcrest Medical Center contends an additional issue of law is whether this Court has jurisdiction under EMTALA (Plaintiff specifically deny this contention).

5. This is a jury matter.

6. All trial witnesses for each party are as follows:

For **Plaintiffs:**

PRIMARY WITNESSES **PROPOSED TESTIMONY**

...

SECONDARY WITNESSES **PROPOSED TESTIMONY**

...

For **Defendant Carolyn Cobb** and **Tulsa Emergency Physicians, inc.,**

PRIMARY WITNESSES **PROPOSED TESTIMONY**

...

For **Defendant Hillcrest Medical Center:**

PRIMARY WITNESSES **PROPOSED TESTIMONY**

...

SECONDARY WITNESSES **PROPOSED TESTIMONY**

...

All trial exhibits, including depositions, for each party, including any admission or objection to admissibility thereto, are as follows:

...

8. Settlement is very unlikely.
9. Estimated length of trial: 5 to 6 days.
10. This amended Agreed Pre-Trial Order, as filed, shall supersede the pleadings and govern the trial and subsequent disposition of the case, unless modified by the Court to prevent manifest injustice. NDOK LR 16.2.

DATED this 13th day of December, 1999

/s/ Sven Erik Holmes
The Honorable Sven Erik Holmes
United States District Judge

Approved as to form and content:

/s/ Richard S. Toon
Richard S. Toon, O.B.A. #16069
Attorney for Plaintiffs

/s/ Gregory V. Copeland
Gregory V. Copeland, O.B.A. #15985
Attorney for Plaintiffs

/s/Daniel E. Holeman
Daniel E. Holman, OBA #11865
Eric Begin, O.B.A. #15671
Attorney for Defendants Cobb, Tulsa
Emergency Physicians, Inc.

/s/John Paul
John Paul, O.B.A. # 6971
Attorney for Defendant Hillcrest
Medical Center

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS,By and through her mother, legal guardian and next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR.,parent of Martin Shane Phillips	)	
the Plaintiffs,	)	
	)	Case No.98-CV-829H(E)
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma	)	
the Defendants.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS

HAD ON NOVEMBER 30, 1999
PRETRIAL CONFERENCE

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

Glen R. Dorrough
UNITED STATES COURT REPORTER

MR. COPELAND: We do not.

THE COURT: All right.

MR. COPELAND: But we do know also that certain investigation was done because a death certificate that winds up over in the possession of Hillcrest Medical Cen ter at the time that the records are eventually turned over to the plaintiffs' lawyers on October 30th. There's a death certificate from the death over at Tulsa Regional Medical Center. The medical records custodian Arlene Hagemann, she did not tell the plaintiffs that she was working also over there at Tulsa Regional Medical Center at the time of her deposition. She is head of medical records over there, she's head of medical records over here at Hillcrest Medical Center. A document, a death certificate winds up over there in the documentation of Martin Shane Phillips' file. A document is missing. A conversation had taken place from one corporation to the next. A conversation has also taken place to our client stating that you should check into this because of the situation, they should have known.

In addition do that, Your Honor, what we do have is what we believe to be a forged document. I think the dots can very easily be made at trial on this. It's such a blatant -- Your Honor, part of the position of the plaintiffs' case is it's such a blatant, blatant scenario that happened to this young man that this is the lengths that they have gone to cover

this particular situation up.

THE COURT: So the total sum and substance is that Ms. Ross received a call, and she's in Risk Management, notifying her of the death of the deceased; right?

MR. COPELAND: Notifying the head of Hillcrest Medical Center, yes.

THE COURT: Well, the fact she's in Risk Management.

MR. COPELAND: Yes.

THE COURT: All right. So we have the fact of the call; right?

MR. COPELAND: Right.

THE COURT: Then we have the testimony that Ms. Daczewitz viewed the document that said "no insurance" and that was never produced; right?

MR. COPELAND: Correct. There's one other thing. Do you want me to tell you now or do you want --

THE COURT: No, go ahead.

MR. COPELAND: The plaintiffs have requested all documentation in this case as it pertains to Martin Shane Phillips, regardless of whether it was a scrap piece of paper or not. Dr. Cobb testified in her deposition that she made her dictation by making notes. In other words, we asked her the question are you going off of your memory. There's some interpretation potential in favor of Dr. Cobb, but it also can go in favor of the plaintiffs, but she basically says that I

made notes as to what was important. In other words, we have not received notes that Dr. Cobb may have or did not make. In addition to that she says that she gave him --

THE COURT: You've received no notes in the discovery?

MR. COPELAND: No. We have received dictation we have seen formal medical documentation, but according to her testimony it's very unclear, Your Honor, as to whether or not -- in other words, if you look at the documents upon which she dictates she's very specific as to what she says his pulse rate is, what his respiration rate is, what his BP is, all those things two days later after seeing gobs and gobs of other patients in between. And we asked her a question as to what it is that she utilizes to make a precise dictation. She says I made notes of what was important to me. So you're going off your note? Are you going off -- so you made -- you're going off your notes? I'm going off of what my habit is. So the interpretation is either it's notes or its habit, but nonetheless if it's habit she's not looking at the medical documentation to dictate the dictation. In other words, she's not looking at the triage sheet, she's not looking at the nursing assessment sheet to make this dictation according to her testimony. But that's totally contrary to what the normal human being could possibly do in the same situation.

Second, in addition to all of the others, we have

asked in production requests for all of the items that would be pertaining to Martin Shane Phillips in any way, whether it be a scrap of piece of paper basically. We have not received any documentation showing that there in fact was a Parafon Forte as she claims she gave him.

THE COURT: Did --

MR. COPELAND: Taken from her.

THE COURT: Did she testify that she took notes?

MR. COPELAND: Your Honor, I did not do that deposition and in all deference to Mr. Toon that's a question that was not asked. I don't know exactly if we got sidetracked or what the -- or what exactly was going on in that. But I do have the particular testimony for the Court's reference under Exhibit 2 of yesterday's filing if the Court would like to look at it.

THE COURT: So we don't know if she took notes?

MR. COPELAND: Your Honor, it's unclear according to our deposition that we took of her. And that's why --

THE COURT: Isn't it important to know?

MR. COPELAND: It is important. It's something we can ask at trial. But it's also, in other words, she's got to either say one of two things, she was either looking at the documents of the medical record chart to make this dictation or she was doing it by her habit or she was doing it by her notes. Either way, I don't think that her answer was that she

was looking at the chart, but it's pretty obvious that she was. And because she was, then why did she ask -- why did she state in her medical record, Your Honor, that I believe I gave him a Parafon Forte. Please look at the discharge sheet for that particular information, is basically a paraphrase of what she says, although I have it right there in quotes if the Court would like to see it.

But as I have been trying to tell the Court, one other document that we have not received, and that is the entry that would be required for the record to be made of the controlled substances log that says I gave him a Parafon Forte, therefore that should be in the medical records and has not been turned over to the plaintiffs. So that document is missing. Why would that document not be given to the plaintiffs? Because it did not happen is the plaintiffs' case. And if the defendants choose to produce a document that does show this particular entry the plaintiffs would ask that we could depose those particular individuals that are in charge of producing that document to test its authenticity.

THE COURT: Let's focus on your question of this handwriting expert for a moment.

MR. COPELAND: Okay. May I bring the --

THE COURT: Go ahead.

MR. COPELAND: Thank you. Your Honor, just for the sake of brevity I want to show the Court real quickly the first

page of her dictation and how she lists out specific things in here. She says sputum production. He denies these things. No fever, no chills, no nausea, no vomiting, no sinus drainage. She comes down here and gives exact dictations of what his BP was that's listed on the triage sheet, and is also listed up here. She gives these exact numbers listed on Barbara Petty, the LPN, who assessed the condition of Martin Shane Phillips after he had seen a triage nurse.

One of the interesting things, Your Honor, is that of all the documents signed by the decedent he signed every legal document required to be signed as he came into the emergency room. He signed the medical treatment authorization. He signed the financial responsibility. He signed even the discharge sheet -- the discharge sheet. But one thing he did not sign, he did not sign, Your Honor, the big questionnaire upon which the defendants basis their entire defense on right here where it says patient/responsible person's signature. You see the physician Dr. Cobb. You do not see Martin Shane Phillips' signature on here. And here's the questionnaire that the plaintiffs are saying is not a valid foundation for defense. As the Court can see they have got three drugs listed on here cocaine, heroin, marihuana. Use of drugs not prescribed by a physician. So I don't want to address that issue any further, Your Honor, but other than to point out to the Court --

THE COURT: Are you getting to the handwriting expert?

MR. COPELAND: Yes. Yes, I am. I wanted -- what I'm saying is this is part of what we -- this is another addition to the conspiracy argument or the cover-up argument, is that these particular, this particular document does not necessarily have a date on it and that this very well could have been constructed subsequent to the dictation over there at the Tulsa Regional Medical Center Emergency Room by Stan Stacy, who stated in there that there was a drug situation that he discovered. So therefore this could have been done -- or we're missing another document that does not even have his signature on it. Dr. Cobb has testified in her particular testimony that she does not know if he signed this or not or filled this out.

Now, the discharge sheet, Your Honor, you will see here under medications -- this is basically her initial impression, cervical spasms. You will she that this is what she's prescribed him, Norflex and Naprosyn. One's a muscle relaxer, the Norflex; an anti-inflammatory for the Naprosyn. But if you look under medication here, Your Honor, the medical policies and procedures of Hillcrest Medical Center require all of the appropriate boxes to be checked. Here you see medication received may cause drowsiness. Notice the word "medication received." She says she gave him a 500 milligram pill of Parafon Forte. This particular pill, Your Honor,

causes drowsiness. She knew that he was by himself, beca use they have got him stated in the medical record ambulatory and by himself. It's in the medical documentation. So if she truly gave him a Parafon Forte, then why is this particular box not checked. If she truly gave him a Parafon Forte, why is it not listed according to medical policy and procedure as set out on the plaintiffs' exhibit on yesterday's motion, why is Parafon Forte not listed out here as some of the drugs that she gave him?

Now, here is the document in question. Wha t we are saying, Your Honor, is that upon all of these situations and connecting these dots and figuring this out, and what we believe to be a fact, you've got three initials. You've got Barbara Petty here, you've got Barbara Petty here, and y ou've got a BP here, that we say is not the signature of the LPN Barbara Petty. What we are saying, Your Honor, is that she went in and filled in two days later on her dictation date, when she realizes that she game gave him Norflex. Tachycardia, a person with tachycardia does not get Norflex. She goes, oh, no. That's the plaintiffs' argument. Oh, no, I've messed up. But rather than give him a phone call saying, hey, come back into the emergency room on the second day when she is making this dictation. According to the policies and procedures of Hillcrest Medical Center, she is required to be precise in her dictations. Here's how precise she was, "I gave him a Parafon

Forte and I believe also a prescription for an anti-inflammatory. Please refer back to his discharge sheet and I hope this will be a self-limited problem," I would direct the Court's attention to please refer back to his discharge sheet and I direct the Court's attention to the specificity by which she made her dictation all in one setting. And if she has got chart in her hand, Your Honor, why wouldn't she just turn to the discharge sheet and look, when she's required by the policies and procedures of Hillcrest Medical Center -- just all she had to do was turn the page and look. So, Your Honor, what we're saying is is that she has gone back and tried to confuse and obscure the record so that when a doctor looks at this situation he reads the dictation, because most doctors look at the dictation. And he looks at the dictation and says oh, Parafon Forte. Okay. And also an anti-inflammatory. But she does not mention, she does not at all mention in her dictation the Norflex, the one drug that causes problems with tachycardia patients. One of the significant things that this drug does is it causes problems with tachycardia patients, it also causes nausea and vomiting which is what he arrived at the Tulsa Regional Medical Center four and a half days later. His chief complaint was nausea and vomiting. That was by the Norflex. You get the phone call from Tulsa Regional Medical Center, you get the phone call to Dr. Cobb and the phone call to LaDonna Stepp allegedly stating

that our client says that she's a murderer. You put these pieces together, Your Honor, and she's got a high motivation as to why she would want to make the dictation the way she did. A high motivation as to what the document reflects right now. And then on top of it when we suspected it, Your Honor, as soon always we suspected it, we made an effort to talk to the district attorney's office at Creek County, a gentleman by the name of Robert Robertson who is in the field of looking at forged checks day in and day out, that's all he does. And he looked at this under a magnifying glass and he said these are not from the same person on the BP down here. So what the plaintiffs are asking this Court to do today, Your Honor, is to amend and add him as a witness on this particular pretrial order. The pretrial order has not been finalized and we believe that there's substantial evidence as to what's gone on in this particular --

THE COURT: What's the portion on this that you are specifically referring to and identifying here?

MR. COPELAND: You want me to identify it?

THE COURT: Yes.

MR. COPELAND: This particular portion, Y our Honor, has to do with the time -- okay. Barbara Petty signs off right here 16:25, time discharged by the RN.

THE COURT: Uh-huh.

MR. COPELAND: Supposedly at 16:20, five minutes

beforehand, she is alleged to have signed off on the drug Parafon Forte. We're saying that because the Hillcrest Medical Center policy requires every nurse to turn around and sign off on these particular drug transactions, we think that Dr. Cobb forged Barbara Petty's signature here because she could not get Barbara Petty's okay on that. And one of the significant things, Your Honor -- is the Court through with me here?

THE COURT: And what does Ms. Petty say about that?

MR. COPELAND: Your Honor, we didn't, at the time we took her deposition we did not -- I don't know if we specifically went through each BP. We did ask her is this your signature and are these your initials, but I don't know if we did it just generally or whether we laid it out, is this your initial here, is this your initial here, is this your initial --

THE COURT: But the portion of your alleged forgery is the Parafon Forte, that line right there?

MR. COPELAND: This line?

THE COURT: Right.

MR. COPELAND: The actual -- okay. We think that Dr. Cobb wrote this because she could, because this would be her handwriting normally in this situation.

THE COURT: Yeah.

MR. COPELAND: But we think that the BP is not Dr. Cobb's -- it's not Lugenia Cue's. The report is attached

as Exhibit No. 8 on plaintiffs' motion to amend its witness.
One of the significant things that came out of the deposition of LaDonna Stepp is that she showed Dr. Cobb this file at the time this conversation came forth that allegedly Christina Daczewitz stated Dr. Cobb's a murderer.
THE COURT: All right. Anything else on this, sir?
MR. COPELAND: I think that will about c over it, Your Honor.
THE COURT: And is there any basis upon which you can show cause why the possession of this for some 14 months hadn't caused you to raise this question before?
MR. COPELAND: Your Honor, quite frankly, in dealing with this case it has been a very hard, arduous battle to get various policies and procedures and we did not get the policies and procedures until October 27th as the final tally of, yes, you have got all of the policies and procedures. And at th at particular point, Your Honor, that's whenever got real scrutinizing with everything because the policies and procedures themselves --
THE COURT: And how long had discovery deadline passed since you started scrutinizing everything?
MR. COPELAND: The discovery deadline?
THE COURT: Right.
MR. COPELAND: The discovery deadline was July 30th.
THE COURT: Okay. So you're saying July, August,

1 September, October, that three months after the close of
2 discovery you started you scrutinizing everything?
3 MR. COPELAND: No. No, Your Honor, that's not what
4 I'm saying. What I'm saying is there's --
5 THE COURT: That excuses the first nine months but
6 what happened? You didn't think that you needed to start
7 scrutinizing anything for the first nine months you had it?
8 MR. COPELAND: Most of the plaintiffs' -- Mr. Toon
9 and I are the only counsel in this case and we've seen about
10 eight other lawyers on the other side, and we have spent all of
11 our time, Your Honor, trying to deal with motions and trying to
12 police the particular documents that we think that we were not
13 receiving. We filed a motion to compel. We filed an appeal of
14 the motion --
15 THE COURT: But you had this for 14 months?
16 MR. COPELAND: We had the actual medical record, yes,
17 Your Honor. We had it since October -- about November 2nd, I
18 think. The mailing of the --
19 THE COURT: So 13 months about, from the time you have
20 had possession of it to today; is that accurate?
21 MR. COPELAND: We had the medical records, Your Honor.
22 THE COURT: This record?
23 MR. COPELAND: This record.
24 THE COURT: All right.
25 MR. COPELAND: But what I would state to the Court on

that, Your Honor, is certain policies and procedures are what triggered the thought process of what Dr. Cobb's responsibilities were in this scenario, and those policies and procedures are superseded throughout the entire manual and policy and procedure. So until we got the actual final, this is your policy and procedure for which you are using the universe of which to look upon, that's when we started really tightening down and saying what's really going on here. We knew, every time I looked this document, Your Honor, it did not look right to me, but the revelation from heaven did not come to this person right here, Your Honor, until a week ago. And it's not from lack of due diligence, I can assure the Court.

THE COURT: All right. Why don't we return to, if you could --

MR. COPELAND: Move these?

THE COURT: -- move those and we will return to Mr. Paul.

Mr. Paul, where are we on the drug testimony issue, sir?

MR. PAUL: Your Honor, I have the -- as I understood the Court wanted something in regard to Melody Bradley.

THE COURT: Right. Where is that?

MR. PAUL: And to Stan Williams.

THE COURT: Right.

MR. PAUL: And to Alan Vernon. I can tell you -- and

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS,By and through her mother, legal guardian and next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR.,parent of Martin Shane Phillips the Plaintiffs,	)	
	)	Case No.98-CV-829H(E)
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma the Defendants.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 2, 1999
PRETRIAL CONFERENCE

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

Glen R. Dorrough
UNITED STATES COURT REPORTER

is in this three-page that is pertaining to that?

THE COURT: I've reviewed it, sir, and the ruling is that you have had it for 13 months and there's no basis upon which to open it up to a handwriting expert at this time. All right. So the handwriting expert is out.

Let's talk about the cover-up theory generally. Do I understand your papers that the cover-up theory is based upon the fact that Liz Ross received a call from Tulsa Regional? I mean, I've got no objection, you can ask Ms. Ross whether she was called by Tulsa Regional. But where else -- you certainly are in a position to ask if there were some other -- and you have a witness who will testify that there was documents that said "no insurance" on it.

MR. COPELAND: Right.

THE COURT: Right? You have Tulsa Regional in communication with Ms. Ross for whatever set of circumstances.

Right?

MR. COPELAND: I'm sorry?

THE COURT: We don't know exactly why because we don't know what was said on that conversation. Right?

MR. COPELAND: We know what the conversation was between her and Dr. Landgarten.

THE COURT: Right, that's what I'm saying. We don't know what the original conversation -- but she's going to be called, right, Ms. Ross?

MR. COPELAND: And that as a result of that conversation they had learned that shortly thereafter the decedent presented to the Tulsa Regional Medical Center. He died. And that conversation was basically implying, from Elizabeth Ross to Dr. Landgarten, that we received a phone call from Tulsa Regional Medical Center informing us that this gentleman died over there.

THE COURT: Right.

MR. COPELAND: And that Mr. Landgarten said, well, as a result of that, make sure that the review board takes ahold of this and runs with it, is basically the gist of the testimony.

THE COURT: And we have a paragraph that "TRMC, Hillcrest and certain agents," conjunctive, "employees and associates of Hillcrest were mutually concerned about the unusual features of Martin Phillips' case."

MR. COPELAND: That's the testimony, Your Honor, regarding -- this is not all going to come from Steven Landgarten. That's the testimony we're asking the Court to reconsider, allowing of the redaction statements made to Christina Daczewitz that as part of her investigation she was told, and what spawned her investigation, she was told from the doctors and the nurses that had they just checked --

THE COURT: But how does that come from that phone call?

MR. COPELAND: Your Honor, I'm -- I'm -- I'm kind --

THE COURT: You just said that his testimony, which was about the phone call.

MR. COPELAND: Right.

THE COURT: "That the unusual features of Martin Phillips' case were such as to potentially threaten some of these parties and persons."

MR. COPELAND: Well, I think there's --

THE COURT: "That Martin Phillips' case was so perceived by TRMC, Hillcrest, et al., that TRMC, Hillcrest, et al. shared the knowledge and opportunity which would enable them to cover Hillcrest tracks by actions involving Martin Phillips' medical records and that such concerted action was actually were taken by and among some of these parties and persons."

Now that's -- there's a lot going only in that phone call.

MR. COPELAND: That's true. Well, that's the inference that we are drawing from the other facts in the case that we present. I'm not saying that that phone call by itself --

THE COURT: Well, but my understanding -- and I've asked previously what specifically the other facts are going to be, and until that foundation is laid with other facts in the case -- because you would agree that just the mere notification

1 by TRMC to Ms. Ross and Ms. Ross reporting that to Landgarten,
2 that that doesn't carry all of the freight that you have loaded
3 here; right? Just that mere fact.
4 MR. COPELAND: That mere fact alone may not, really.
5 THE COURT: Right. I mean somebody calls somebody and
6 they must have been doing all of this stuff?
7 MR. COPELAND: But the idea of EMTALA and what the
8 hospitals know about EMTALA, and that it's a patient dumping
9 statute. And that a hospital that received a patient that has
10 been dumped or been cursorily reviewed by another hospital and
11 rushed out the door for no insurance, they know that they to
12 inform the other hospital that this is not to be going on. And
13 that particular spin or that particular fact, illuminated
14 beyond the background of this phone call, adds real light as to
15 what's going on in this conversation.
16 THE COURT: Well, but that -- if you develop a
17 sufficient foundation for it, I'm certainly not going to
18 preclude it. But we're not going to open this --
19 MR. COPELAND: Fair enough.
20 THE COURT: -- with some sweeping statement of
21 conspiracy, cover-up and murder.
22 MR. COPELAND: Would the Court --
23 THE COURT: Your causes of action are an EMTALA cause
24 of action and negligence. Right?
25 MR. COPELAND: That is --

THE COURT: The negligence has the effect of causing liability for other parties, but I mean those are essentially the two causes of action and the negligence carries with it several other parties' liability. Right?

MR. COPELAND: That's an accurate statement.

THE COURT: Okay. And that's what you're going to argue in opening statement. Now, if you develop the other and develop sufficient evidence to be arguing cover-up, you're also building a sufficient basis for a ground work for a punitive damage claim.

MR. COPELAND: Right.

THE COURT: But the record as it exists today doesn't have all of this in it by any means. We've got a phone call.

MR. COPELAND: I would also remind the Court that there is another document missing other than the document that the Court has referenced here in this hearing today that is missing from the medical records.

THE COURT: And which is that, sir?

MR. COPELAND: That is the document, Your Honor, that references the tracking of the drug Parafon Forte for which we are alleging was not given to the plaintiff. There's a document, Your Honor, there's a policy and procedure that says they are required to specifically track these drugs as they are controlled substances. And if they -- as they track these, certain people are supposed to initial on them, certain pe ople

are supposed to sign off on them in a log. That's stuff that was requested in discovery and has not been provided to the plaintiffs.

THE COURT: Certainly it would appear to be something covered by the discovery requests in this case, Mr. Holeman, Mr. Paul?

MR. PAUL: Your Honor, I sit idly by and hear these wild accusations and I bite my tongue. I can go back through all of this. I don't know if they attached Dr. Landgarten's testimony in what they presented to you. They didn't attach it to mine. They said they did. He said, yes, he got a phone -- or Liz Ross got a phone call from Tulsa Regional. It all starts with a guess, and that's how they are trying to extrapolate this theory. But you're correct, they never requested the log. It wouldn't be part of the medical chart, number one. And number two, Parafon Forte is not a controlled substance. There's no log kept on Parafon Forte. It's that simple. Controlled substances are narcotics. Parafon Forte is not a narcotic.

THE COURT: All right. Does that -- are we clear on the cover-up theory, sir?

Is it your intention to give the opening statement or is it Mr. Toon?

MR. COPELAND: We haven't decided that yet, Your Honor.

THE COURT: All right.

MR. COPELAND: I think just whoever is feeling a little stronger that day. But in response, Your Honor, I would just ask the Court if the Court would be interested in letting us -- first of all, I would like to say this, that in all opening statements, Your Honor, there's no foundation that's been laid for anything that's said, and usually it is the jury that holds --

THE COURT: So your theory is you could say anything you want?

MR. COPELAND: No. But what I'm asking the Court --

THE COURT: And what cabins that presentation, sir?

MR. TOON: I'm sorry? I didn't understand the Court's question.

THE COURT: Well, what is it that restricts your opening statement? Is it just your feelings on that particular day or are there other things that would limit your ability to make opening argument?

MR. COPELAND: Your Honor, I would apologize to the Court on this area of the law. I did not anticipate this problem that the Court would find with the plaintiffs' case and that I will research it. And I would ask if the Court would receive a brief on the matter. And I would ask that --

THE COURT: Well, we've talked about it, I've reviewed what you have argued to be -- and we went in some length at the

last proceeding about what constitutes the elements of your cover-up theory. And I've ruled on it, that you're not going to start with prejudicial and inflammatory accusations. You can build a foundation for it. And as I say, if you properly build the foundation, not only will you be able to argue it in closing but you will also be arguing punitive damages. So there is a pot at the end of that rainbow, but you have to put it in place. I'm just saying based on what has been argued as forming the reason for it, as it stands right now, any such argument would be wholly prejudicial and without -- it would be unfair based on the evidence. So that's the area of the law I'm in. But you're not foreclosed on demonstrating that you have evidence that would support the kinds of instructions and closing arguments that you would want to see in this case. But we're just not going to start there. Nobody has got the right to start -- I mean, any more than Mr. Holeman or Mr. Paul can stand up and say we have a fellow who is just, you know, all you're going to hear about is that he died of drug overdoses. I mean, of course there's no evidence he died of a drug overdose, but so what; right? They are limited as well in what they can. They have to be responsive to the causes of action just as you have to be faithful to your causes of action.

MR. COPELAND: Your Honor, I would agree with the Court wholeheartedly that there are parameters by which you make an opening statement that should not be violated. What I

was asking the Court or was going to ask the Court in making that statement, was would the Court be interested in allowing us to brief in light of the facts that is now --

THE COURT: We've heard your recitation of it. We don't need to re -- when I asked -- that's why we're having all of these proceedings is that we use those. We don't use them as an opportunity to have another hearing to rehash what we just did. I've heard your representations at some length last hearing, and this hearing, and you've submitted papers on it. So the rulings on the limitations of opening statement are now of record. Your objection to that ruling will be reflected in the record.

Now, let's move on to whatever else is left on the list. All right.

MR. COPELAND: I think that would be the drug testimony.

THE COURT: All right. Mr. Paul, you are recognized, sir.

MR. COPELAND: May I be excused, Your Honor?

THE COURT: Yes.

MR. COPELAND: Thank you.

MR. PAUL: Your Honor, I believe the Court has previously ruled in part on this, and I have nothing to add other than my submittals on Alan Vernon and Melody Bradley. think that's what -- it's my understanding that's what we're

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS,By and through her mother, legal guardian and next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR.,parent of Martin Shane Phillips	)	
the Plaintiffs,	)	
	)	Case No.98-CV-829H(E)
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma	)	
the Defendants.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 8, 1999
PRETRIAL CONFERENCE

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

Glen R. Dorrough
UNITED STATES COURT REPORTER

MR. PAUL: Her name is Pat Johnson. Patricia. She goes by Patricia.

THE COURT: And this is the person that Ms. Daczewitz spoke with?

MR. PAUL: Yes. This came up, remember the Court -- earlier that Ms. Daczewitz is now going to say that there was a document that said "no insurance." When I found that out I went out to Hillcrest. There's 15 or 20 ladies that work in the medical records department, and I took picture. One of the things that was on the CD was a picture of Ms. Daczewitz, younger, when she got married. So I took her picture --

THE COURT: She's married now; right?

MR. PAUL: When she was married to Mr. Phillips.

THE COURT: Oh, okay.

MR. PAUL: She was 16 when she married. She's 23 now. But I said, well, let me see if anybody -- I figured it was like looking for needle in a haystack, so I left the picture, asked around, no one remembered her. And then this morning I found out someone inadvertently, Pat Johnson, does remember her, was there the woman there. Pat was off work at Hillcrest from October 18th until just about 10 days ago.

THE COURT: What did Ms. Daczewitz. Didn't she have some testimony as to who she spoke with?

MR. PAUL: No.

THE COURT: She didn't have any name at all?

MR. PAUL: She didn't.

THE COURT: Any identifying trademark?

MR. PAUL: She didn't.

THE COURT: All right. Go ahead.

MR. PAUL: And so it's our opinion that since the plaintiffs believe that this witness or this incident is so critical to this cover-up conspiracy theory that now I have located that individual, have an opportunity to respond. Her only purpose --

THE COURT: Did she fess up?

MR. PAUL: She did not to me.

THE COURT: All right.

MR. PAUL: Her only purpose would be respond to her dealings with Ms. Daczewitz. She actually remembers a couple of phone calls, Ms. Daczewitz attempting to get the medical chart. Patricia Johnson told me Ms. Daczewitz said she wanted it for social security purposes, I guess to apply for social secure benefits for her daughter because of the death of Martin Phillips, which makes sense.

Her testimony, if I put her on, absent some cross-examination, wouldn't take 10 minutes. So it would be very brief. It would just be to that narrow issue in response to this situation they have raised.

THE COURT: All right. Mr. Toon, have you got this motion on Pat a/k/a Pam Johnson?

MR. COPELAND: If it may please the Court.

THE COURT: Yes, go ahead, sir.

MR. COPELAND: Your Honor, I don't know exactly what Mr. Paul is saying that this witness will add to the trial in this matter in the context what is she going to rebut as it pertains to Christina Daczewitz. She's going to actually be able to identify Christina Daczewitz and come in here and say, no, at the time I handed that through this window at that particular time, I recognize this lady and there's no way that she did see this on the document. That would be one of the points I would offer to the Court. I don't know exactly what purpose they could offer the witness other than to do that.

In addition, this particular witness is their employee and has been around for the entire length of this trial. And I will admit to the Court that this did come out in the pretrial hearings, I think it was the first or second hearing, regarding the testimony of Christina Daczewitz. But they have had the opportunity to talk to all of the witnesses on this, and if it is a situation where it is a cover-up or hiding of documents, such as that, I don't see how this particular witness is going to add to enlightening the Court or the jury regarding anything along those lines. And we would object as it's out of time.

THE COURT: Well, it's certainly out of time and it's dramatically out of time, really, under the circumstances. What I would like you-all to do is to -- they will make

Ms. Johnson available to you tomorrow and we will take it up thereafter.

MR. COPELAND: Regarding a deposition, you mean?

THE COURT: Right. So she will be made available to you at your convenience tomorrow to achieve that. I don't know what made her so elusive over this period of time, but that's a starting point as a minimum. All right?

MR. COPELAND: Okay, Your Honor.

THE COURT: What else? Mr. Paul, anything else before we take up exhibits?

MR. PAUL: No, sir, just those items I mentioned.

THE COURT: All right. Why don't we start with the -- I guess we can start with the plaintiffs' exhibits if we could, sir. And, Mr. Toon, you are recognized, sir, on these.

MR. TOON: Mr. Copeland is going to handle that, Your Honor, if it's all right.

THE COURT: Oh, okay. Mr. Copeland. And the last issue that we had left in abeyance was number 15, the mission statement; is that right?

MR. COPELAND: Yes, Your Honor.

THE COURT: 19 would be -- all right, I'm not going to admit the mission statement.

MR. COPELAND: I'm sorry, Your Honor?

THE COURT: The mission statement will not be admitted. It's about the system, not about the hospital. And

depositions. I don't know that it will come up on the wit ness stand but --

THE COURT: But, I mean, what issue does it even intend to address here?

MR. PAUL: I don't know.

THE COURT: Mr. Copeland?

MR. COPELAND: What is the Court's question to me, Your Honor?

THE COURT: Is there something in the testimony that you might anticipate that suggests that Mr. Phillips was unaware of Naprosyn or was intending for this drug to work?

MR. COPELAND: There is some testimony, Your Honor, by I think one or two individuals, that made the conclusion that he was waiting to go to a doctor, letting the drugs take effect on him. But I think that gets into their conceded, previously conceded defenses, Your Honor, of contributory negligence as to why he did not go to a doctor in a certain time frame. And the Court previously ruled stated if they stated a peep of that kind of information -- if I understand correctly and remember correctly the accuracy of what I'm stating to be true -- that if they stated a peep of that kind of information in their defense, then we may be able to address the Court and ask the Court to let it be known to the jury via the statements of Martin Shane Phillips that he stated to various individuals that he was treated and released from Hillcrest Medical Center

for lack of insurance and rushed through because of no insurance. And so therefore that would address a rebuttal as to why they are saying he should have gone to the hospital sooner than he did. I think that this particular kind of information, Your Honor, was also covered under their conceded defense that we brought to the Court's attention.

THE COURT: My question is not what they have conceded. My question is that for purposes of what's left and what you are going to be putting on in trial, is there something to which this is even arguably responsive to?

MR. COPELAND: I don't necessarily think it would, because the testimony, Your Honor, would be that he wanted the drugs to have the opportunity to take effect. That does not answer the question that Mr. Paul has raised, that he had knowledge that these drugs would take care of the particular condition of which he had.

THE COURT: Well, 179 will be out for the time being. If there's something about the testimony that suggests that -- of the kind that Mr. Paul has referred to, then we will revisit it, but it will start by being out. All right. And that takes us through the --

MR. PAUL: Your Honor, I can move quickly --

THE COURT: All right.

MR. PAUL: -- down to his employment application which is 259 and everything between 180 and 258 can be out.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS,By and through her mother, legal guardian and next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR.,parent of Martin Shane Phillips	)	
the Plaintiffs,	)	
	) Case No.98-CV-829H(E)	
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma	)	
the Defendants.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 10th, 1999
PRETRIAL CONFERENCE

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

Glen R. Dorrough
UNITED STATES COURT REPORTER

MR. COPELAND: -- that may be used for decision making.

THE COURT: All right. Go ahead. All right, go ahead, sir, what --

MR. COPELAND: Your Honor, in the hearing on Wednesday, actually starting on Tuesday, Mr. Paul stated in the presence of all counsels before the hearing or before the pretrial conference on Tuesday afternoon that he had not yet reviewed or seen the CD that had been provided by the plaintiffs. He stated that his laptop was at home and he did not have the equipment to view it at his office. At the pretrial conference on Wednesday Mr. Paul represented to the Court, and I quote, "One of the things on the CD was a picture of Ms. Daczewitz." He was referring to the CD the plaintiffs gave to the defendants on Monday of this week. Mr. Paul continued and I'll quote again, "I figure it was like looking for a needle in a haystack so I left the picture and I asked around, no one remembered her, and this morning I found out someone inadvertently, Pat Johnson, does remember her." That's on Page 22, line 16, Your Honor.

There was nothing inadvertent, is what the plaintiffs want to say to the Court, about Ms. Johnson remembering Ms. Daczewitz. Ms. Johnson did not in fact remember Ms. Daczewitz from the photograph at all. That's in Ms. Johnson's deposition yesterday, testimony at line or Page 39

line 5. In addition, Your Honor, in discovery, computer screen printouts which have been handed to the Court with the initials, PJ which represent Patricia Johnson, were provided to the plaintiffs by Hillcrest Medical Center via Mr. Paul in response to production requests of the plaintiffs. That was way back in the beginning of this year. This is not a needle in a haystack situation as Mr. Paul stated on the record on Page 22, line 17.

In addition to the fact that Ms. Johnson was called into, as she testified in her deposition, she was called into her supervisor's office and was specifically asked about this photograph a week ago Thursday, yesterday. Plaintiffs would submit to the Court that the statement that Mr. Paul made to the Court that this was inadvertently come upon the mind of Patricia Johnson would be somewhat of an inaccuracy. According to Pat Johnson's testimony, her mind was definitely turned to the matter when she was called into Arlene Hagemann's office which was five days before Mr. Paul ever received a copy of the plaintiffs' CD on Monday night when we had the meeting at 5:00 among the counsels where we provided this CD that had this picture on it. That apparently from the record on the 8th, Mr. Paul stated to this Court that this picture is what he circulated to Ms. Johnson. Ms. Johnson is stating in her deposition that she looked at this picture last Thursday. And if the source of this picture came from the CD, then I don't

1 know how she could have seen it last Thursday. So there's some
2 inconsistencies either from the representations made by
3 Hillcrest Medical Center or there's some inconsistency made by
4 Ms. Johnson in her deposition.
5 In addition, Your Honor, in regard to this needle in
6 the haystack theory of attempting to locate Ms. Johns on and a
7 person who had dealt with the plaintiff or the person who is
8 bringing the lawsuit as next friend, Christina Daczewitz, the
9 haystack gets a little bit smaller in the context that in
10 response to a Hillcrest interrogatory, No. 15, on May 26t h,
11 1999, Ms. Daczewitz stated in that record that she had two
12 conversations attempting to get the medical records of Martin
13 Shane Phillips. Ms. Daczewitz also stated that she had three
14 phone conversations with persons from Hillcrest Medical
Center
15 in that exact same response Interrogatory No. 15. Pat Johnson,
16 Your Honor, is only one of four employees at the time of the
17 events surrounding this particular lawsuit, September 1998,
18 that was in the medical records department at the time that
19 this occurred and is still in the medical records department at
20 the time that this occurred. The other three individuals which
21 have been brought to the attention of the plaintiffs yesterday
22 in the deposition have been either transferred out or no longer
23 work there.
24 What the plaintiffs want to state to the Court, Your
25 Honor, is that this information has been lying around for a

very long length of time for Hillcrest Medical Center, when they say that they are offering Ms. Johnson for one of the statements, I understand she is to make is something about she remembered this because of a social security interest that Ms. Daczewitz had stated when she was seeking the medical records and in fact was in person in Hillcrest Medical Center asking for these medical records. If the Court would look at Plaintiffs' Exhibit, I think it's 21 that's been handed to the Court, the Court can see very clearly that it says the responsible person is PJ, right there.

We would state, Your Honor, that they have filed an extremely out of time, this motion to amend this particular witness. And in addition to that , we feel that there has been somewhat a scrunching of time in the context, that first of all, I want to tell the Court that we had provided all of the pictures that are part of that CD to the defendants in the exchange of exhibits at the previous time schedule for whatever that time frame was, but it's been probably at least over two months ago, I guess, maybe two and a half.

I believe, Your Honor, that that would potentially indicate, since Mrs. Johnson's testimony is that she reviewed this picture and in fact did not recognize as was represented to this Court, that she recognized, as is the statement in the record, I believe, by Mr. Paul on Wednesday, that she did not recognize on that particular date when she saw this particular

picture. I'm assuming, Your Honor, that this picture came from an exhibit if in fact -- that had been previously exchanged, if in fact she did look at this picture as she states in her testimony. But one thing we do know, Your Honor, is that whenever another opposing counsel is asserting to ask the Court to amend an out-of-time witness and the facts surrounding that request are facts that are not entirely accurate, either on Mr. Paul's part or on Ms. Johnson's part, however the Court may so find. Then in this context, Your Honor, I really believe that it is indicated that there's a favorable result being sought by Hillcrest to couch these facts in the way that they did. And for these particular reasons, Your Honor, we believe that Mrs. Johnson should not be allowed to be brought before this Court or in front of a jury at this late date.

THE COURT: What did Ms. Johnson have to say in her deposition that might occasion prejudice to the plaintiffs, sir?

MR. COPELAND: I'm sorry, Your Honor. I could not hear you.

THE COURT: What did she have to say in her deposition?

MR. COPELAND: As it relates to prejudice to the plaintiffs is the question?

THE COURT: Right.

MR. COPELAND: Your Honor, one of the things that she

states in her deposition is that what caused her to go through and remember the conversation with Ms. Daczewitz is because Ms. Daczewitz was stating that she needed the records for the benefit of her daughter to obtain the social security. If that were true, Your Honor, we would need also to talk to other witnesses, these other three witnesses that are no longer present because one of the things that she stated was -- we believe that they are going to offer this particular witness, another reason, Your Honor, is to say that they do not -- this particular person says she never goes to the window or the counter where the public would greet in this circumstance and request the sign off a medical release authorization. She says she would never bring to that window, and never has, a file with her of the Hillcrest medical records. This is where the testimony is needed by the plaintiffs to establish the fact that Minnie Christina Daczewitz did in fact see this particular file. And if there are three other witnesses out there that have been disclosed in this particular setting of this deposition, we would at least need to be able to talk to these witnesses to find out whether or not their habits are to potentially bring these files to the counter. That's one thing.

Another thing is I don't find this particular witness very credible, Your Honor, because there's nothing, there's no notes that she made of this particular conversation. She

states that she, after having a meeting with Ms. Hagemann in her office last Thursday, that she remembers the convers ation with Ms. Daczewitz, not as a result of this picture as Mr. Paul would state, but because of the content of a social security statement that was basically something she stated on the record as having no reference point other than to say she re members that. But the thing about -- the interesting thing about that, Your Honor, is there's over -- she stated there's over 684 individuals in the position of Minnie Christina Daczewitz wherein she states, I find that your request is invalid be cause you're not the next of kin, and she also elaborates a little bit, Your Honor, and couches her context in that there are -- these are the kinds of reasons that things are stated to be invalid, is that they are not the next of kin. So beca use there's no note, Your Honor, her testimony is highly suspect and very favorable to Hillcrest Medical Center, but would give them an excuse or explanation as to potentially saying that Minnie Christina Daczewitz is in fact the one that would be lying on the witness stand or making this up. And without having the opportunity to look at these other witnesses, it would require discovery to be expanded and opened. But, Your Honor, I don't feel the representations by Mr. Paul -- I will not say that he has intentionally misrepresented something to the Court, but the facts in the context that they are highly suspect that someone is not being completely forthright. And

for those reasons, Your Honor, we do not believe that they should get the benefit, the defendants should not get the benefit of what's going on in this particular request in this motion.

THE COURT: All right. Mr. Paul, you are recognized, sir.

MR. PAUL: Your Honor, addressing first my conduct. What I thought I said and what I read that I did say was that the picture that I took out there was one of the pictures that was on the CD. I didn't take the CD out there. They gave me those pictures some months ago. And that was what I was intending to say. This all came up when they reluctantly advised the Court and me that Ms. Daczewitz was going to testify that when she came in to pick up the records there was this document that said "no insurance." When that first occurred because there's 15 or 20 -- actually I understand there's 33 people who work in that medical records department, I took some pictures of Ms. Daczewitz out there and asked around and then left them and said if anybody remembers waiting on this lady or seeing her, to let me know. Apparently when Arlene Hagemann, who is the medical director, and her deposition was taken sometime last week when Patricia returned to Hillcrest. She was off, Patricia wasn't working at Hillcrest when I went out there. She left October 18th and transferred to Doctors' Hospital. She came back November 22nd,

which was the week of Thanksgiving. So apparently sometime the following week Arlene went to her, showed her the picture. I didn't say she remembered it from the picture, because I didn't think she did, but that caused Pat Johnson to go look at her notes and what was in the record on the computer and then Pat then remembered by seeing not this one, but there was another computer sheet that had Fred Phillips and the next of kin and this lady was the mother of the deceased child -- I mean the mother of the child of the deceased and so forth, Pat said she remembered this lady coming in. And so we're offering her merely for the purpose of responding to the allegation that the plaintiffs have made now that there was some document that said "no insurance," because Patricia Johnson remembers waiting on that person. Had the plaintiffs been candid in their discovery responses -- and I think this is important because I went back and looked. This was back during the summer and I asked them in an interrogatory of the plaintiffs to state with specificity and in full detail any and all communications the plaintiffs had with any defendants or their agents and the identity of the persons involved, the date and time and so forth. And you go over to Christina Daczewitz and what she has to say. She says this. Approximately mid October 1998, Ms. Daczewitz phoned Hillcrest to find out what she needed to do to get a copy of Martin Shane Phillips' records. She was told to come down and sign for them. When she got there she stood at the counter

with the person who had the file of Martin Shane Phillips in her hand and they would not release the records to her. Now, they clearly did not fully answer that question in all candor. They clearly intentionally left that out so that they could spring it on us. Now, had I known that at that time I would have started this search back when I got the interrogatory answer, but I didn't know it until they disclosed it on October 29th. Pat Johnson was one of the individuals whose name was given to them in Arlene Hagemann's deposition in May of 1999. They even had her on the witness list, their witness list, they had her on the pretrial order so she's not a new person. But she didn't become important, in fact no one from medical records became important until that disclosure of October 29th. That's when I started the search. Unknown to me, Pat Johnson was not working at Hillcrest, had left. When she returned we discovered her involvement. She has now given her deposition. They don't need to take the depositions of those other people, that's just a red herring, just trying to keep her out. We're just having her respond to this new allegation we didn't know about from Christina Daczewitz.

THE COURT: Mr. Copeland, anything further, sir?

MR. COPELAND: Yes, Your Honor.

THE COURT: All right. Briefly, sir.

MR. COPELAND: First of all, in response to Mr. Paul stating that we intentionally left something out to ambush him

or whatever that is, that's completely doesn't reflect what's in the record on the interrogatory, Your Honor. This question --

THE COURT: Considering earlier you asked to only talk about your evidence in camera. I think you can't really take the position that you were not hoping to spring things at trial.

MR. COPELAND: Well, I'm saying we weren't nonresponsive to his question on the interrogatory.

THE COURT: It was just a general philosophical note, not a specific comment. But, go ahead.

MR. COPELAND: His interrogatory about which he read a portion of the response, because the response is qu ite lengthy. But the request for which we respond says "State with specificity and in full detail any and all communications, whether oral, or written, or otherwise, that plaintiffs, including agents, employees of defendant, if applicable, has had with this defendant relating in anyway directly or indirectly with the allegations and contentions in this lawsuit. As to each such communication state the identity of each such person or persons involved in the communication, the place, date and time of each such communications, the substance of each communication."

Now, this directly goes only to communications, written or oral. It doesn't pertain to anything that she

1 glanced down and saw something, that was not a communication,
I
2 don't think that the Court would find that, at least I would
3 hope not because then I'd -- I don't know what I would do about
4 that. But, Your Honor, in the response it's very specific as
5 to Minnie Christina Daczewitz. He read to the Court one
6 paragraph and she has got over -- almost over a page and half
7 in response in that, Your Honor.
8 In addition, Your Honor, in the Arlene Hagemann
9 deposition, this is my question to Arlene Ha gemann and this is
10 Mr. Paul's response as it relates to Pat Johnson. "How many
11 people are involved in the release of information" -- this is
12 to Arlene Hagemann "How many people are" --
13 "Question: How many people are involved in the
14 release of information in the department area that you're over
15 within the medical records custodian.
16 "Answer: Four.
17 "Question: Four individuals?
18 "Answer: Uh-huh.
19 "Question: What are their names?
20 "Answer: Pat Johnson. Now, I guess I need to ask do
21 you want current people because we have had some turn over.
22 "Question: Is the turn over right rate very high
23 where you are?
24 "Answer: Not in the release of information area so
25 much but in the clerical side it has been.

"Question: I don't guess off the top of your head you would know all -- who all was present in September of 1998?

"Answer: Sorry, I really don't. I know that Pat Johnson was there for sure."

This is my statement to Mr. Paul on the record.

"Mr. Copeland: Mr. Paul, I thought you prepared her for this deposition?

"Mr. Paul: I did. But I prepared her for relevant questions. How about that?

"Mr. Copeland: I understand.

"Mr. Paul: That wasn't one of them."

In this particular exchange, Your Honor, Mr. Paul is on the record admitting that Pat Johnson is not something that's relevant to this particular case, although at that particular time they knew in our responses to interrogatories that there was an issue about the medical records that we have contended all along, and it's even in the contentions of this lawsuit that they have not given us all of the medical records, and they were slow about getting them to us. So at that particular time, Your Honor, Pat Johnson testified the first time she was ever contacted and asked about this particular file, Martin Shane Phillips' was last Thursday, a week ago yesterday. If he was in due diligence going to actually do what he's representing to this Court, Your Honor, he just stated again on the record there are only 33 employees in the

1 medical records department. And I direct the Court's attention
2 to Page 11 of Arlene Hagemann's excerpt that I handed to the
3 Court. "How many employees do you work with that are in that
4 department?"
5 "Answer: 38."
6 He has told the Court 33, on Wednesday he to ld the
7 Court there are 15 to 20 women that's in there, and he has
8 passed the picture around and now, Your Honor, we've got
9 deposition testimony from Arlene Hagemann who says there are
10 38. We've got deposition testimony from -- and the question I
11 follow-up with is are there -- are you over any of those 38
12 individuals or 37 individuals, if you're including yourself in
13 the 38? So there's a little question of ambiguity whether
14 she's including herself in the 37 or 38. When I asked Pat
15 Johnson yesterday, Your Honor, how many employees
are in the
16 medical records department, she said 37.
17 So Mr. Paul in due diligence doesn't even know how
18 many employees are in the medical records department, Your
19 Honor. He's stating that her testimony is not relevant when he
20 has not even talked to Pat Johnson, when she stated on the
21 record that it was only last Thursday when she has ever been
22 approached about this particular file.
23 THE COURT: All right. I'm going to ho ld in abeyance
24 the Pat Johnson ruling. We'll address it after Ms. Daczewitz
25 has testified. I'm not going to reject her at this time nor

accept her. We'll just cross that bridge when we get to it.

All right.

Let's talk about the Hillcrest exhibits if we could.

Mr. Paul, you are recognized.

MR. PAUL: Thank you.

THE COURT: And I believe we were talking about 3, 4, 11, 12, 13 and 15; is that right, sir?

MR. PAUL: Yes, sir.

THE COURT: All right.

MR. PAUL: If the Court please, we might take up the 3, 4 -- the Court has already ruled on number 5, and I was going to take up his prior medical records as one group and then if the Court wants to go by them.

THE COURT: Well, let's just do 3, 4, 11, 12, 13 and 15; shall we?

MR. PAUL: Okay.

THE COURT: That's all I was geared up for today.

MR. PAUL: That would be fine. Number three, are the records from East Side Family Practice Clinic. And again we think his prior medical records are pertinent for several reasons. First of all, to show some of his vital signs when he has sought medical treatment in the past.

Number two, that the fact that he has sought medical treatment at all, because there has been some testimony by several of his friends, Mr. Mike Daczewitz for one, who said

that it was very unusual for him to go to the doctor, he was hardly ever sick. And yet when we get the medical records we saw that he had, actually some of the slightest bit of ailments that he didn't hesitate to go see a physician. So I think it would be probative and helpful to the jury to know what hi s past medical history has been, what his past vitals have been, what doctors he has sought in the past and why. And that would apply to Exhibit No. 3 and Exhibit No. 4, Exhibit No. 15; and that was my argument for Exhibit No. 5 also which was the Tulsa Regional record. That was a self-inflicted wound. The Court excluded it on that basis at that time because it was a self-inflicted wound.

THE COURT: Okay. I'm going to keep these out unless there is some basis upon which they are undertaking to paint a picture completely inconsistent with something that's in these records.

MR. PAUL: All right.

THE COURT: So but they are out until in. All right that would cover 3 then is out, 4 is out. What else d oes that cover?

MR. PAUL: Number 15.

THE COURT: 15.

MR. PAUL: For Utica Park Clinic records.

THE COURT: 3, 4 and 15 are out; right?

MR. PAUL: Yes Honor. And the Court would give us a

That also addresses, Your Honor, at length we have had discussions about the testimony of Dianne Miller and the mind set of Martin Shane Phillips wherein the Court said there was no quantum leap or no logical inference that could be drawn based off the evidence that we had that he had in fact established this mind set that he could not go to the doctor. So anyhow, Your Honor, what we are saying here is this is not a proper exhibit, the foundation cannot be laid as far as the time frame and all of that goes. Otherwise, we would say we should be able to get back into the context, Your Honor, of that particular statement made time and time again by Martin Shane Phillips where he stated they rushed me through at Hillcrest Medical Center and they ran me through because I had no insurance. And so we get into these facts where he goes up to his work, speaks to Dianne Miller, and she's trying to get his insurance card straightened out, and then the mind-set thing, and it goes on and on and on.

THE COURT: All right. Well, I'm not going to admit it. I don't even know what issue it's probative of that's involved in this lawsuit. If some of the things come to pass that could form a basis for making it probative then you can revisit it, but I can't envision what those would be.

All right, does that cover everything?

MR. PAUL: I don't have any exhibits left.

THE COURT: All right. Does that cover -- just so

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, And As next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS,By and through her mother, legal guardian andnext friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS JR., parentof Martin Shane Phillips	)	FILED MAR 31 2000
the Plaintiffs,	)	Case No.98-CV-829H(E)
vs.	)	
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, and CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma Corporation doing business in the State Of Oklahoma	)	
the Defendants.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 13, 1999 THROUGH DECEMBER 17, 1999

JURY TRIAL- VOLUME I-V

1 antibiotic to Mr. Phillips, not one to treat his infection.
2 The evidence will be that martin Phillips should have been
3 admitted into the hospital. He should have been admitted under
4 Hillcrest's own policies and procedures. That's another policy
5 and procedure they violated. And these policies and
6 procedures, ladies and gentlemen, are the ones that they
7 created, that they drafted and that are in their own emergency
8 room. The same thing that Dr. Carolyn Cobb thought of when
9 Martin Phillips was at the ER on September 23rd is the same
10 thing that contributed to his death less than five days later.
11 The evidence will be, if he had been treated on September 23 of
12 1998 he would have lived. He would have lived.
13 You're going to see that Hillcrest thought that Martin
14 Phillips did not have insurance. You're going to see that he
15 was not treated appropriately because he didn't have proof of
16 insurance that day. We are going to prove to you, the evidence
17 is going to show, that Hillcrest discriminates against people
18 that don't have proof of insurance in the emergency room.
19 You're going to hear about a federal law. This
20 federal law requires hospitals like Hillcrest to provide an
21 appropriate medical screening to some patients. Marty Phillips
22 was one of those patients. Marty Phillips was never provided
23 an appropriate medical screenings at Hillcrest. You are going
24 to hear that Hillcrest, even before Marty Phillips saw
25 Dr. Cobb, had already decided to release him from the
emergency